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No. 75-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL C. McCRARY, etc., *et al.*,
and
COLIN M. GONZALES, etc., *et al.*,

Petitioners,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON
and
FAIRFAX-BREWSTER SCHOOL, INC.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC., IN OPPOSITION

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INDEX

	Page
JURISDICTION	2
QUESTIONS PRESENTED	2
ARGUMENT	3
CONCLUSION	12

CITATIONS

Cases:

Aleyska Pipeline Serv. v. Wilderness Society, 44 L.Ed.2d 141, 154	8
Allen v. Gifford, 462 F.2d 615 (C.A. 4, 1972), cert. denied, *sub nom.*, Gifford v. Allen, 409 U.S. 876	6
Almond v. Kent, 459 F.2d. 200 (C.A. 4, 1972)	3, 6
Auto Workers v. Hoosier Corp., 338 U.S. 696 (1966)	7
Bronston v. United States, 409 U.S. 352 (1973)	10
First National Bank in Sioux Falls v. Dunham, 471 F.2d. 712 (C.A. 8, 1973)	10
Johnson v. Railway Express Agency, 44 L.Ed.2d 295, 302 (1975)	7
O'Sullivan v. Felix, 233 U.S. 318 (1914)	7

Page

F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116, 129 (1974) 8

Skil Corporation v. Lucerne Products, Inc., 503 F.2d 745 (C.A. 7, 1974) 9

Universal Oil Co. v. Root Refining Co., 328 U.S. 575 (1946) 8

Statutes and Rules:

42 U.S.C. Sec. 1981 . . . . . 2, 3, 7

42 U.S.C. Sec. 1982 6

42 U.S.C. Sec. 1983 3

45 U.S.C. Sec. 285 9

Civil Rights Act of 1871 7

Labor Management Relations Act 7

Sec. 8-24, Code of Virginia (1950) 2, 3

Rule 19, Rules of the Supreme Court of the United States . 2

Rule 54(d), Federal Rules of Civil Procedure 10

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Fairfax-Brewster School, Inc., one of respondents herein, prays that the Petition for Writ of Certiorari be denied.

JURISDICTION

Petitioners' statement as to this Court's jurisdiction to hear the Petition is accepted. It is this respondent's contention, however, that the case does not fall within the guidelines set forth in Rule 19, Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Petitioners' statement of questions presented is not acceptable in the form in which set forth because it is argumentative and states conclusions not supported by the facts. This respondent would restate each question as follows:

1. Whether Virginia's two-year statute of limitations which expressly applies to every action for personal injuries, or Virginia's five-year statute of limitations which expressly applies to every personal action for which no limitation is otherwise prescribed and which survives the death of the claimant, is the most nearly analogous Virginia statute of limitations applicable to a civil rights action brought under 42 U.S.C. § 1981.

2. Whether the mere fact that the district court believed the testimony of the Gonzaleses and their witnesses, and not the testimony of the respondent's witnesses, in a suit instituted more than three and one-half years after the discriminatory act complained of, brings this case within the "bad faith" exception to the American rule governing the award of attorneys' fees, under which such award is ordinarily denied in the absence of express contractual or statutory authorization.

ARGUMENT

I

In the first section of their Reasons for Granting the Writ, petitioners are in essence asking this Court to take jurisdiction for the purpose of giving a different interpretation to the statutes of limitation of Virginia than what is now the well-settled doctrine in that state.

Petitioners waited three years and seven months before filing suit under 42 U.S.C. § 1981. As a result, the claims of the adult petitioners against this respondent were held by the District Court to be barred by the two-year Virginia statute of limitations applicable to actions for personal injuries. This holding was affirmed unanimously by the Court of Appeals, sitting *en banc*. The statute not being a bar to the claim of the infant plaintiff, the district court awarded compensatory damages to him, and this ruling was affirmed by a majority of the panel, the minority dissenting on the broad issue as to the applicability of 42 U.S.C. § 1981 to a private school for children.

Petitioners contend that the term "personal injuries" as used in the statute is limited to physical or bodily injuries, and therefore the two-year statute governing actions for personal injuries is not applicable. None of the cases cited by petitioners so holds, and the contention is unreasonable on its face.

Almond v. Kent, 459 F.2d 200 (C.A. 4, 1972), involved a civil rights claim under 42 U.S.C. § 1983. In holding that the two-year statute governing actions for personal injuries was applicable to civil rights actions, the Court said, at page 203:

"Congress has not enacted a statute of limitations applicable to suits arising under § 1983. In such circumstances federal courts follow the limitations period fixed by the law of the state in which the district court is held. O'Sullivan v. Felix,

233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914). Unlike some other states, Virginia has not enacted a statute of limitations which is specifically made applicable to § 1983 suits.[3] We must, therefore, grapple with the Virginia general statute of limitations. 2. Va. Code Ann. § 8-24 (1957 Repl. Vol.), which the parties agree is the one to be applied. It reads:

> Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued . . . .

"The district court, after considering the statute and the case law construing it, held that the one-year period of limitations applied to all aspects of Almond's claims. In this appeal, no party seriously urges the correctness of this result. Almond suggests that his claim should be fragmented with the two-year period (beating and other personal injuries) and the five-year period (all other alleged causes of action, if any) each applying in part. Gaunce, Davis and Brown conceded that to the extent the complaint claims damages for personal injury, the two-year period applies, Greeson v. Sherman, 265 F. Supp.

"[3] See, for example, the reference to the Colorado statute in Salazar v. Dowd, 256 F. Supp. 220 (D. Col. 1966). Because of the rising tide of § 1983 suits against state officials and the difficulty of applying a statute enacted primarily to deal with different types of litigation, Virginia may well wish to consider the enactment of a similar statute."

340 (W.D. Va. 1967), but they argue that the five-year period is inapplicable, Westover Court Corporation v. Eley, 185 Va. 718, 40 S.E.2d 177 (1946), and that strong public policy dictates resort to the one-year period. Kent, because he is unaffected, takes no position.

"We agree that, to the extent that Almond's § 1983 complaint alleges a violation of his constitutional rights resulting in personal injuries of the type that would be actionable at common law, the Virginia two-year period unquestionably applies. But this is so, not because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten. We think it follows that the Virginia two-year period applies to all other rights which may be redressed under § 1983 by the recovery of money damages. Section 1983 creates a federal cause of action, unknown at common law, '[for] the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]. . . .' This right of recovery depends upon federal considerations, and it is not one which is concerned with the archaic concepts of survivability of the common law. Barnes Coal Corp. v. Retail Coal Merchants Assn., 128 F.2d 645 (4 Cir. 1942). See also, Brazier v. Cherry, 293 F.2d 401 (5 Cir. 1961), cert. den., 368 U.S. 921, 82 S. Ct. 243, 7 L.Ed.2d 136 (1961); Pritchard v. Smith, 289 F.2d 153 (8 Cir. 1961). In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.' Under Virginia law, it is the object of litigation which determines the applicability of a statute of limitations not the form in which suit is instituted. Birmingham v. Chesapeake & Ohio Railway Co., 98 Va. 548, 37 S.E. 17 (1900); Friedman v. Peoples Service Drug Stores, 208 Va.

700, 160 S.E.2d 563 (1968). See also, Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969). Hence, our conclusion that the Virginia two-year period of limitations, applying to '*every* action for personal injuries" (emphasis added), applies generally to § 1983 suits.

"Even if we conclude that a § 1983 action is not a suit for 'personal injuries' within the Virginia concept of that type of litigation, it is 'more serious than a violation of a state right . . . even though the same act may constitute both a state tort and the deprivation of a consitutional right.' Monroe v. Pape, 365 U.S. 167, 196, 81 S. Ct. 473, 488 (1961) (Harlan, J., concurring). Accordingly, we think that it more properly belongs at the two-year step in Virginia's statute of limitations scale of values. It is more important than those transitory torts for which a one-year period is prescribed, and it is not to redress damage to property and estate for which Virginia prescribes a five-year period. See Westover Court Corp. v. Eley, 185 Va. 718, 40 S.E.2d 177 (1946)."

Almond was followed in *Allen v. Gifford*, 462 F.2d 615 (C. A. 4, 1972), cert. denied, *sub nom., Gifford v. Allen*, 409 U. S. 876, involving a civil rights action under 42 U.S.C. § 1982. In the instant case, the seven-member panel of the Fourth Circuit was unanimous in holding that the two-year statute applied. At 515 F.2d 1082, 1097, the Court said:

> "While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the first sentence of Virginia Code Sec. 8-24, applicable to actions for personal injuries. It is contended on appeal that

> the judge should have applied Virginia's five-year statute, the second sentence of Sec. 8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under § 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two-year statute. Allen v. Gifford, 4th Cir., 462 F.2d 615; see Almond v. Kent, 4th Cir., 459 F.2d 200. It is also contended that the five-year statute for actions on a contract, Virginia Code Sec. 8-13, applies, but it is clear that no action on a contract is involved." (Pet. 34a).

In *Johson v. Railway Express Agency*, 44 L.Ed.2d 295, 302 (1975) this Court, citing *O'Sullivan v. Felix*, 233 U.S. 318, 58 L.Ed. 980, 34 S. Ct. 596 (1914) (Civil Rights Act of 1871), *Auto Workers v. Hoosier Corp.*, 338 U.S. 696, 701-704, 16 L. Ed.2d 192, 86 S. Ct. 1107 (1966) (Labor Management Relations Act), and other decisions, said that since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under 42 U.S.C. § 1981, the controlling period would ordinarily be the most appropriate one provided by state law, and held that the one-year Tennessee statute which was by its terms applicable to Federal civil rights actions, was clearly and specifically applicable to a civil rights action under 42 U.S.C. § 1981 instituted in Tennessee. *Johnson* would appear to be dispositive of this portion of petitioners' Reasons for Granting the Writ. The Court of Appeals was plainly right in applying Virginia's two-year statute of limitations to the claim of Mr. and Mrs. Gonzales.

Finally, it is submitted that this contention of the adult Gonzaleses does not raise an important issue of general public interest or application, but an issue that affects themselves

alone, stemming from their own neglect and failure to file the action within the entirely reasonable and appropriate two-year limitation period.

II

The second ground upon which petitioners seek certiorari would introduce a new and frightening concept into the law. Every losing party whose version of the facts is not accepted by the court or jury which heard the testimony would *ipso facto* become a perjurer and liable for payment of the attorneys' fees of the prevailing party. Not surprisingly, petitioners have nothing in point in the way of precedent to offer in support of their contention. And they resort to exaggeration and very loose language in their efforts to bring the facts of this case within the holdings or rationale of the cases they cite.

They refer to a comment in *Aleyska Pipeline Serv. v. Wilderness Society*, 44 L.Ed.2d 141, 154, that "'a court may assess attorneys' fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .'", quoting from *F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129, 40 L.Ed.2d 703, 94 S. Ct. 2157. But in the instant case there was no charge, finding or conclusion by the district court that the respondent had acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

They refer to "the district court's finding that the defense witnesses did not testify truthfully," but there was no such finding.

They refer to "false testimony given under oath", but there was no finding or statement by the district court that any of the defense witnesses had testified falsely.

They cite *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575 (1946) as though it supported their contention when in fact it does nothing of the kind. This Court in *Universal* did

not award counsel fees and the case did not involve merely the question of whose testimony was believed by the trier of the facts. It involved the question of a judgment obtained by fraud. What this Court said in *Universal,* probably by way of dictum, was that if the court in which a judgment was fraudulently obtained conducts a proper hearing to investigate the matter, and finds after such proper hearing that "fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties", and that in such a case a court may assess counsel fees as part of the taxable costs. (328 U.S. at 580).

Petitioners cite *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745 (C.A. 7, 1974), an action brought under 45 U. S.C. § 285, which provides:

> "The court in exceptional cases may award reasonable attorney fees to the prevailing party."

The district court in *Skil* awarded attorneys' fees because the testimony of the losing party's president and principal stockholder was, in the words of the court:

> ". . . contrary to his company's prior position and contrary to all documentary evidence. The disengenuousness of his testimony on this subject impressed this court at the time as a gross disregard of the facts, if not bad faith, and as an ill-advised attempt to salvage an invalid patent." (503 F.2d at 750).

The Seventh Circuit in affirming said, at page 750:

> ". . . accepting, as we do, the District Court's findings with respect to Matthews' testimony, that testimony amounted to an unconscionable act done

> with deceptive intent and was a sufficient basis for an award of attorneys' fees."

Petitioners cite *First National Bank in Sioux Falls v. Dunham*, 471 F.2d 712 (C.A. 8, 1973), in which the district court awarded attorneys' fees against the losing party under Rule 54(d) of the Federal Rules of Civil Procedure. The aggravated circumstances in that case are set forth in the opinion of the Circuit Court, at page 713:

> "Judge Lord states in his opinion that the award of attorneys' fees was made for 'dominating reasons of justice' and because L.T. Dunham's conduct made it necessary for the plaintiff to litigate with third parties in order to enforce his judgment. The record reveals that L.T. Dunham has attempted to conceal assets, that he has made fraudulent conveyances subsequent to the instigation of litigation in South Dakota, an l that he engaged in extensive evasive and dilatory tactics that tended to delay and hinder the trial court. In addition, the record reveals that Thomas Dunham gave misleading testimony at the urging of L.T. Dunham, that L.T. Dunham attempted to bribe a handwriting expert and that certain records were falsified for trial. On the basis of this record, we find no abuse of discretion on the part of Judge Lord in awarding the attorneys' fees."

Finally, petitioners cite *Bronston v. United States*, 409 U. S. 352 (1973), which did not involve the question of awarding attorneys' fees against the losing party because his version of the facts was not accepted at trial, but the question of whether or not a particular perjury conviction was proper.

No other cases were cited by petitioners in support of the second section of their Reasons for Granting the Writ.

The Court of Appeals in the instant case disposed of this contention of petitioners in the following language:

> "The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.
>
> "We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying 'obstinate obduracy'. Brewer v. School Board of City of Norfolk, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of 'obstinate obduracy',[6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revised statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of the litigation." (515 F.2d 1082, 1089, Pet. 17a).

"6. In refusing punitive damages, the district court found that the defendants had not 'acted recklessly or willfully in disregard of clear existing law.' 363 F. Supp. at 1205 n. 5."

With respect to this contention of the petitioners, as with their first one, the Court of Appeals was plainly right in its ruling. Petitioners have failed to present substantial or even plausible arguments for the granting of a writ of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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